

# Federal Personnel Manual System

FPM Letter 990-2

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**RETAIN UNTIL SUPERSEDED**

**SUBJECT:** Publication of Final Regulations of MSPB's Office of the  
Special Counsel

Washington, D. C. 20415

August 12, 1980

Heads of Departments and Independent Establishments:

1. The Office of the Special Counsel (OSC) of the Merit Systems Protection Board (MSPB) published its final regulations in the Federal Register on December 21, 1979, replacing interim regulations of OSC that were published on January 30, 1979.
2. On January 15 and February 15, 1980, OSC published technical corrections to the regulations.
3. The OSC regulations have also been published in the 1980 edition of Title 5, Code of Federal Regulations.
4. These final regulations govern the procedures for the receipt and investigation by the OSC of allegations of prohibited personnel practices in Federal agencies and activities prohibited by other civil service laws, rules, or regulations. The regulations also establish procedures for the receipt and referral of whistleblower allegations to agencies for investigation or a report.
5. OSC has distributed copies of its final regulations to Federal agencies. As a courtesy and a convenience to agencies and to reemphasize the importance of these regulations, we are attaching copies of the final OSC regulations, as well as the technical corrections to those regulations.
6. Eventually, OPM will reprint the OSC regulations in the portion of the Federal Personnel Manual (Supplement 990-1) which contains laws, Executive orders, and regulations affecting personnel management. This will provide a useful reference service for offices that subscribe to the FPM. OPM will not, however, be the source or distributor of authoritative copies of the OSC regulations or of any future revisions. Agencies will remain responsible for keeping informed about the OSC regulations and other OSC issuances which may be needed to conduct agency business and to advise employees of their rights under the OSC regulations.



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Attachment

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**OFFICE OF THE SPECIAL COUNSEL,  
MERIT SYSTEMS PROTECTION  
BOARD**

**5 CFR Parts 1250-1269**

**Prohibited Personnel Practices and  
Activities: Procedures for the Receipt  
and Investigation of Allegations**

**AGENCY:** Office of the Special Counsel.  
**ACTION:** Final rules.

**SUMMARY:** These regulations set forth the procedures for the receipt and investigation by the Office of the Special Counsel of allegations of prohibited personnel practices in Federal agencies and activities prohibited by other civil service law, rule, or regulation. The regulations also establish procedures for the receipt and referral of whistleblower allegations to agencies for investigation or a report.

**EFFECTIVE DATE:** December 20, 1979.

**FOR FURTHER INFORMATION CONTACT:** Mary Eastwood, Associate Special Counsel (Investigations), Office of the Special Counsel, 1717 H. Street, N.W., Washington, D.C. 20419 (202-653-7140).

**SUPPLEMENTARY INFORMATION:** The Special Counsel published interim procedures for operations in the *Federal Register* on January 30, 1979 (44 FR 6060). On August 24, 1979, proposed final regulations were published for comment (44 FR 49958). These regulations supersede the interim regulations. Comments were received from eleven Federal agencies, one labor organization, and five public interest groups. Following is a summary of the major comments and changes in the regulations as published on August 24.

**Definitions**

(§ 1250.3). The definition of "whistleblower" has been revised to make clear that disclosure of information prohibited by statute is not protected except as noted below. The definition is also expanded to make clear that protected disclosures may be either oral or written, and that the information may be disclosed to any person, whether within or outside the agency. Further, protected disclosures include disclosures to the Special Counsel, an agency Inspector General, or other agency employee designated by the agency head to receive such information, even if the disclosure would otherwise be prohibited by statute or required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

One commentator suggested the deletion of the statement that where the

information disclosed affects only the personnel situation of the complainant it will be treated as an allegation of a prohibited personnel practice or violation of other civil service law, rule, or regulation, and the complainant will not be considered a whistleblower. This change has not been made in the regulations because the Special Counsel has direct investigative jurisdiction in such cases. The intent of the statement is to retain investigative authority in this Office rather than referring the matter to the agency, as in the case of whistleblower allegations.

A definition of "abuse of authority" has been added (§ 1250.3(f)).

The definition of prohibited personnel practices (§ 1250.3(b)(9)) relating to reprisal for exercising an appeal right granted by law, rule, or regulation, has been revised to make clear that the exercise of an appeal right includes the initial filing of a complaint or a grievance. Employees who win their complaints or grievances of course do not have to "appeal". It would be contrary to the purpose of the Civil Service Reform Act if only employees who lost their complaints or grievances and had to appeal to another entity were protected from reprisals.

One commentator suggested that the definition of prohibited personnel practices (§ 1250.3(b)(10)), relating to discrimination based on conduct that does not adversely affect the performance of the employee or applicant or the performance of others, be amended to make explicit that discrimination based on union activity or membership is covered. Such discrimination is an unfair labor practice and, of course, is within the primary responsibility of the Federal Labor Relations Authority (5 U.S.C. 7116). Although discrimination because of union activities could also constitute a prohibited personnel practice, specific examples of protected conduct are not set forth in the definition to avoid any construction that may limit the applicability of the provision to the type of conduct expressly mentioned.

**Matters Subject to Special Counsel  
Investigation**

(§ 1251.1). A new paragraph (d) has been added to § 1251.1 to include the Special Counsel's authority to investigate matters and order corrective action, under the Freedom of Information Act and the Right to Financial Privacy Act of 1978 on the basis of court findings.

**Deferral to Administrative Appeals  
Procedures**

(§ 1251.2). One commentator suggested that the Special Counsel should not investigate any allegation that could have been the subject of an appeal or grievance, except where the complainant can show cause for not filing a timely appeal or grievance. This would be unduly restrictive on the authority of the Special Counsel, particularly since most matters are grievable. Section 1206(e)(2) of title 5, United States Code, contemplates deferral to an administrative proceeding only if the Special Counsel determines that the matter may be more appropriately resolved by that procedure. Many complaints received in the Special Counsel's Office allege that agency procedures are not effective or that there is failure of the agency to process the grievance or other matter. Thus, in some instances where there is an available agency procedure the Special Counsel could not make the statutory determination that the matter may be more appropriately resolved by the agency procedure. Deferral in those situations would not be proper.

Section 1251.2(c) has been revised to provide that where a complainant failed to file a timely administrative appeal, the Special Counsel would not defer if the complainant can show that he was not notified of the time limit and was not aware of it, or that circumstances beyond his control prevented him from filing a timely appeal.

**Exhaustion of Agency Procedures as  
Prerequisite to Special Counsel Action**

One commentator suggested that a policy statement can be included in the regulations on whether all other administrative remedies should be exhausted before a whistleblowing complaint is brought to the Special Counsel. Such a statement is not included because the statute clearly provides for direct submission of allegations to the Special Counsel (5 U.S.C. 1206(b)(1)(B)), as well as for submitting allegations to the Special Counsel after they have been disclosed in the agency or elsewhere.

**Notice of Terminating Investigations**

(§ 1251.4). One agency recommended that the agency, as well as the complainant, be notified when an investigation is completed or terminated. The statute requires that the complainant be notified in all cases (5 U.S.C. 1206(a)(2)). However, in many cases the inquiry or investigation is terminated after review of the material submitted by the complainant and



without any contact with the agency. There are cases in which, even if all allegations were proven, they could not constitute a prohibited personnel practice or violation of any civil service law, rule, or regulations, and cases in which it is clear the Special Counsel has no jurisdiction. No useful purpose would be served in notifying the agency in these cases. Accordingly, this change has not been made in the regulations. However, the Special Counsel's Office does notify agencies of the results of an investigation or the termination of an investigation if there has been some contact with the agency in the case.

#### Stay of Personnel Actions

(§ 1254.2). Several public interest groups noted that paragraph (d) of § 1254.2 providing that the Special Counsel will not seek a stay where the taking or failing to take a personnel action does not impose an undue hardship on the employee and the matter can be addressed through an available appeals procedure, is inconsistent with Congressional intent. In order to avoid unduly restricting the stay authority, paragraph (d) has been deleted.

One agency recommended that advance notice of requests for 15 day stays pursuant to 5 U.S.C. 1208(a) be given to the agency. The proposed regulation provided that such notice would be given only "where administratively practicable." This provision for notice to the agency has been deleted entirely because the statute does not contemplate any agency response to a Special Counsel petition for a 15 day stay, and no notice is required. As a matter of policy, the Special Counsel will nevertheless promptly inform agencies of all actions taken by the Office affecting them.

#### Protection of Rights of Alleged Offenders

One commentator suggested that the regulations should require that an alleged offender be informed when a complaint is filed so that he has an opportunity to defend himself during the course of the investigation. It is the Special Counsel's view that the rights of alleged offenders are amply protected by the statute, the regulations of the Merit Systems Protection Board (5 CFR Parts 1200-1202, as added by 44 FR 38342), and the disclosure policy of the Office of the Special Counsel (Appendix I to Part 1261, § F). Moreover, the normal investigative procedures of the Office include opportunity for all witnesses having information regarding a matter to submit their views to the investigator.

Accordingly, no change is made in the regulations.

#### Internal Operating Procedures

Several of the public interest groups made constructive suggestions relating to internal operating procedures for the Office of the Special Counsel. For example, it was suggested that complainants be furnished copies of Special Counsel referrals of whistleblower allegations to agencies for investigation or report under 5 U.S.C. 1206(b) (3) or (7), and any extensions of time given the agency; that the allegations be clearly defined to the agency; and that the complainant be afforded an opportunity to comment on agency reports prior to the Special Counsel's review under 5 U.S.C. 1206(b)(8). A number of these suggestions will be incorporated into the Operations Manual of the Office.

Accordingly, title 5 of the Code of Federal Regulations is amended by revising Parts 1250-1269, as set forth below.

Dated: December 14, 1979.

H. Patrick Swygert,  
Special Counsel.

#### Subchapter B—Office of the Special Counsel

#### PART 1250—JURISDICTION AND DEFINITIONS

##### Sec.

1250.1 General authority of the Special Counsel.

1250.2 Scope.

1250.3 Definitions.

Authority.—5 U.S.C. 1206(k); Sec. 204(g) of Reorganization Plan No. 2 of 1978, unless otherwise noted.

##### § 1250.1 General authority of the Special Counsel.

The Special Counsel is authorized to carry out the following general functions, as described in this subchapter:

(a) To receive and investigate allegations of prohibited personnel practices and certain other violations of law, rule or regulation.

(b) To receive and refer to agencies for investigation or a report certain disclosures of information reasonably believed by the discloser to evidence a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) To recommend corrective action to the agency involved when it is determined that there is reasonable ground to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(d) To file with the Merit Systems Protection Board requests to order

corrective action (if the agency has not taken the corrective action recommended after a reasonable period), requests for stays of prohibited personnel actions, and complaints for disciplinary action against federal employees, and intervene or otherwise participate in any proceeding before the Board.

##### § 1250.2 Scope.

(a) The Special Counsel is required to receive and to investigate allegations of prohibited personnel practices and certain other activities prohibited by civil service law, rule, or regulation involving any Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, except that the prohibited personnel practices set forth below do not apply to:

(1) A Government corporation.

(2) The Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and certain other intelligence agencies excepted by the President.

(3) The General Accounting Office.

(4) The United States Postal Service and the Postal Rate Commission.

(b) The Special Counsel will investigate allegations of Hatch Act violations in any Executive agency, the U.S. Postal Service, and Postal Rate Commission and the District of Columbia Government.

(c) The Special Counsel will receive and act on information which evidences a violation of any law, rule, or regulation, or of mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, involving any Executive agency.

##### § 1250.3 Definitions.

As used in this subchapter:

(a) "Personnel action" means—

(1) An appointment;

(2) A promotion;

(3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;

(4) A detail, transfer, or reassignment;

(5) A reinstatement;

(6) A restoration;

(7) A reemployment;

(8) A performance evaluation under chapter 43 of title 5, United States Code;

(9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; or



(10) Any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

(b) "Prohibited personnel practice" means action by an employee who has authority to take, direct others to take, recommend, or approve any personnel action.

(1) That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation, as prohibited by certain specified laws (see 5 U.S.C. 2302(b)(1)).

(2) To solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual;

(3) To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) To deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) To grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in 5 U.S.C. 3110) of the employee if the position is in the agency in which the employee is serving as a public official (as defined in 5 U.S.C. 3110) or over which the employee exercises jurisdiction or control as an official;

(8) To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal

for being a whistleblower, as defined in paragraph (c) of this section.

(9) To take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule or regulation;

(10) To discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; or

(11) To take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. 2301.

(c) "Whistleblower" means a present or former Federal employee or applicant for Federal employment who discloses information he reasonably believes evidences a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety, if the disclosure is not specifically prohibited by statute and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. A protected disclosure may be oral or written and to any person within or outside the agency. Disclosure of information to the Special Counsel, agency Inspector General, or other employee designated by the agency head to receive such information is protected even if the disclosure would otherwise be prohibited by statute or is otherwise required by Executive order to be kept secret. Where the information disclosed affects only the personnel situation of the complainant, it will normally be treated as an allegation of a prohibited personnel practice or violation of other civil service law, rule or regulation, and the complainant will not be considered to be a whistleblower.

(d) "Gross waste of funds" means unnecessary expenditure of substantial sums of money, or a series of instances of unnecessary expenditures of smaller amounts.

(e) "Mismanagement" means wrongful or arbitrary and capricious actions that may have an adverse effect on the efficient accomplishment of the agency mission.

(f) "Abuse of authority" means an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.

## PART 1251—INVESTIGATIVE AUTHORITY OF THE SPECIAL COUNSEL

### Sec.

1251.1 Matters subject to investigation.

1251.2 Deferral to administrative appeals procedures.

1251.3 Investigation policy in discrimination complaints.

1251.4 Closing cases and terminating investigations.

1251.5 Actions on results of investigations.

### § 1251.1 Matters subject to investigation.

The Special Counsel is authorized—

(a) To receive and investigate allegations of prohibited personnel practices, as defined in section 1250.3 of this subchapter, and to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken (5 U.S.C. 1206(a)).

(b) In addition to matters described in paragraph (a) of this section, to conduct an investigation of any allegation concerning—

(1) Political activity by Federal employees and employees of the District of Columbia Government, prohibited by Subchapter III of Chapter 73 of title 5, United States Code (Hatch Act);

(2) Political activities by certain State and local officers and employees prohibited by Chapter 15 of title 5, United States Code (Hatch Act);

(3) Arbitrary or capricious withholding of information prohibited under section 552 of title 5, United States Code (Freedom of Information Act), except that the Special Counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counter-intelligence information the disclosure of which is specifically prohibited by law or by Executive order;

(4) Activities prohibited by any civil service law, rule, or regulation, including partisan political intrusion in personnel decisionmaking, except when the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure; and

(5) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action, except when the Special Counsel determines that such allegation may be resolved more appropriately under an administrative appeals procedure. (5 U.S.C. 1206(e)).

(c) In the absence of an allegation, the Special Counsel is authorized to conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a



prohibited personnel practice has occurred, exists, or is to be taken.

(d) To conduct an investigation for the purpose of determining whether disciplinary action is warranted against an agency officer or employee—

(1) whenever a court orders the production of agency records improperly withheld under the Freedom of Information Act and finds that the circumstances surrounding the withholding raise questions of whether agency personnel acted arbitrarily or capriciously (5 U.S.C. 552(a)(4)(F)), and

(2) whenever a court determines that an agency or department of the United States has violated the Right to Financial Privacy Act of 1978 and finds that the circumstances surrounding the violation raises questions of whether an officer or employee acted willfully or intentionally with respect to the violation (section 1117 of Pub. L. 95-630).

#### **§ 1251.2 Deferral to administrative appeals procedures.**

Section 1206(e)(2) of title 5, United States Code, provides that the Special Counsel shall make no investigation of allegations described in § 1251.1(b)(4) or (5) of this part, if he determines that the matter may be resolved more appropriately under an administrative appeals procedure. The Special Counsel generally will not initiate an investigation in the following circumstances:

(a) The employee has a pending appeal on the same matter before the Merit Systems Protection Board, the Office of Personnel Management, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, or a pending grievance under a formal agency or negotiated grievance proceeding, unless there is sufficient evidence submitted with the complaint to the Special Counsel to indicate the matter is not being properly processed.

(b) An administrative appeal proceeding has been completed, unless there is sufficient evidence submitted with the complaint to the Special Counsel to indicate the matter was not properly processed.

(c) An administrative proceeding was available to the complainant but the complainant did not file a timely appeal or otherwise failed to pursue the matter, unless the complainant can show that he was not notified of the prescribed time limit and was not aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limits.

(d) The complainant alleges a violation of law, rule, or regulation in connection with a promotion action,

particularly complaints of nonselection or general charges of "preselection", when the information submitted with the complaint to the Special Counsel does not evidence any prohibited personnel practice, as defined in § 1250.3 of this subchapter. In such circumstances the complainant should utilize the agency or negotiated grievance procedure if the matter is grievable.

#### **§ 1251.3 Investigative policy in discrimination complaints.**

The Special Counsel is authorized to investigate allegations of discrimination prohibited by law, as defined in § 1250.3(b)(1) of this subchapter. Since procedures for investigating discrimination complaints have already been established in the agencies and the Equal Employment Opportunity Commission, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiating an independent investigation. However, the Special Counsel will—

(a) Assert independent investigative jurisdiction in those circumstances where it appears that the agency is not processing the complaint consistent with provisions of applicable statutes and regulations; and

(b) In lieu of asserting independent jurisdiction over a complaint, monitor agency or EEOC processing of the complaint, whenever he determines this to be necessary or appropriate.

#### **§ 1251.4 Closing cases and terminating investigations.**

(a) The Special Counsel will notify the complainant of the closing of the case and the reasons therefore, when the matter complained of is not within the investigative jurisdiction of the Special Counsel.

(b) The Special Counsel will notify the complainant of the termination of any investigation under this part and the reasons therefore, and any action taken by the Special Counsel on the allegation.

#### **§ 1251.5 Actions on results of investigations.**

(a) If the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice, as defined in § 1250.3 of this subchapter, has occurred, exists, or is to be taken, which requires corrective action, he reports his determinations, findings and recommendations to the agency, the Merit Systems Protection Board, and the Office of Personnel Management, and may report such finding to the President (5 U.S.C. 1206(c)(1)). If the agency involved fails

to take the action recommended within a reasonable period specified by the Special Counsel, the Special Counsel may request the Board to consider the matter pursuant to 5 U.S.C. 1206(c)(1)(B).

(b) If the Special Counsel has reasonable cause to believe any other violation of any law, rule or regulation has occurred (i.e., violations other than or in addition to a prohibited personnel practice), he is required to report this to the agency head concerned and to require, within 30 days, a certificate by the agency head which states that (1) the agency head has personally reviewed the report of the Special Counsel, (2) what action has been, or is to be taken, and (3) when the action will be completed (5 U.S.C. 1206(c)(3)). Agency head certifications are included in the public list, provided for in § 1260.1 of this subchapter.

(c) When the investigation indicates that disciplinary action against any employee subject to disciplinary charges by the Special Counsel is warranted, the Special Counsel may file a complaint, together with a statement of supporting facts with the Merit Systems Protection Board. The complaint and statement of supporting facts shall be served on the employee at the same time it is filed with the Board. Additionally, in the case of violations of provisions of Chapter 15 of title 5, United States Code (political activity of certain State and local officers and employees), the complaint, including the statement of supporting facts, shall be served on the State or local agency as well as the officer or employee (5 U.S.C. 1206(g)).

(d) In the case of a complaint for disciplinary action against an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the Special Counsel shall submit the complaint including a statement of supporting facts and the employee's response to the complaint to the President for appropriate action in lieu of presenting the complaint before the Merit Systems Protection Board. (5 U.S.C. 1206(g)).

(e) When the Special Counsel believes that there is in an agency a pattern of prohibited personnel practices not otherwise appealable to the Merit Systems Protection Board under any law, rule or regulation, the Special Counsel may file a complaint with the Board against the agency involved to obtain an order for appropriate corrective action. (5 U.S.C. 1206(h)).

(f) If, in connection with any investigation under this part, the Special



Counsel determines that there is reasonable cause to believe that a criminal violation by an employee has occurred, he shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget. The referral of an alleged criminal violation to the Attorney General does not preclude the Special Counsel from conducting any investigation or proceeding concerning prohibited personnel practices instituted under this part. (5 U.S.C. 1206(c)(2)).

#### **PART 1252—DISCLOSURES OF INFORMATION (WHISTLEBLOWING)**

##### **Sec.**

1252.1 Applicability.

1252.2 Referral to agency heads under 5 U.S.C. 1206(b)(3); reports from agency heads.

1252.3 Referral to agency heads under 5 U.S.C. 1206(b)(7).

1252.4 Failure of agency head to file report.

1252.5 Review of agency report.

1252.6 Foreign intelligence or counterintelligence information.

##### **§ 1252.1 Applicability.**

This part applies to disclosures of information not specifically required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs, which the discloser reasonably believes evidences a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to the public health or safety.

##### **§ 1252.2 Referral to agency heads under 5 U.S.C. 1206(b)(3); reports from agency heads.**

(a) If after review of the information received under this part the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of any law, rule or regulation, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health or safety, he will, if the information was transmitted to him by an employee or former employee or applicant for employment in the agency which the information concerns, or by an employee who obtained the information in connection with the performance of his duties and responsibilities, require the head of the agency to conduct an investigation of the information and any related matters and to submit to the Special Counsel a written report setting

forth the findings of the head of the agency.

(b) Any report required by the Special Counsel under this section shall be submitted within sixty (60) calendar days after the date on which the Special Counsel transmitted the information to the head of the agency, or within any reasonable longer period of time agreed to in writing by the Special Counsel or designee of the Special Counsel. In the event the agency finds that it is unable to adequately investigate and report within the time limit imposed by the statute, the agency shall as soon as practicable, but not less than 15 days before the date the report is due to the Special Counsel, the President, and the Congress, submit a written request to the Special Counsel specifying the additional time required and the reasons therefor.

(c) Any report required under this section shall be reviewed and signed by the agency head and shall include: (1) A summary of the information with respect to which the investigation was initiated; (2) a description of the conduct of the investigation; (3) a summary of any evidence obtained from the investigation; (4) a listing of any violation or apparent violation of any law, rule, or regulation; (5) a description of any corrective action taken or planned to be taken as a result of the investigation, including, but not limited to, changes in agency rules, regulations, or practices, restoration of any aggrieved employee, disciplinary action against any employee, and referral to the Attorney General of any evidence of a criminal violation.

(d) Any report required under this section shall be submitted, by the agency head, to the Congress and the President, as well as to the Special Counsel.

(e) The Special Counsel will transmit a copy of the agency head's report to the party who made the disclosure to the Special Counsel, except when the report includes evidence of criminal violations referred to the Attorney General.

##### **§ 1252.3 Referral to agency heads under 5 U.S.C. 1206(b)(7).**

If the Special Counsel does not require an investigation by the head of the agency, the agency head shall, within a reasonable time (but no later than 60 days) after the information was transmitted to him by the Special Counsel, review the information, make any inquiry necessary, and inform the Special Counsel, in writing, of what action has been or is to be taken and when such action will be completed. The Special Counsel will inform the

complainant of the report of the agency head.

##### **§ 1252.4 Failure of agency head to file report pursuant to § 1252.2.**

Whenever the Special Counsel does not receive a required report from an agency head within the time specified in the letter of referral, the Special Counsel may transmit a copy of the information which he sent to the agency head to the President and to the Congress, together with a statement noting the failure of the agency head to file the required report.

##### **§ 1252.5 Review of agency report.**

Upon receipt of any report of the head of an agency under § 1252.2, the Special Counsel shall review the report and determine whether the findings of the head of the agency appear reasonable and whether the agency's report contains the information required.

##### **§ 1252.6 Foreign intelligence or counterintelligence information.**

Any disclosure under this part involving foreign intelligence or counterintelligence information, the disclosure of which is specifically prohibited by law or Executive order, shall be transmitted by the Special Counsel to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

#### **PART 1253—FILING OF COMPLAINTS AND ALLEGATIONS**

##### **Sec.**

1253.1 Place of filing.

1253.2 Form and content.

1253.3 Withdrawal of complaint.

1253.4 Request for stay of personnel action.

1253.5 Disclosure of identity of complainant or whistleblower.

##### **§ 1253.1 Place of filing.**

All complaints, allegations, and information under this subchapter should be submitted to the Office of the Special Counsel, Merit Systems Protection Board, 1717 H Street, NW, Washington, DC 20419, or to the appropriate field office listed below:

450 Golden Gate Avenue, Room 11454, Box 36007, San Francisco, CA. 94102

1100 Commerce Street, Room 9E23, Dallas, Texas 75242

##### **§ 1253.2 Form and content.**

(a) Complaints, allegations and information may be submitted in any written form, but should include:

(1) The name and mailing address of the complainant or whistleblower, unless the matter is submitted anonymously;



(2) The department or agency, location and organizational unit complained about;

(3) A concise description of the actions complained about, names and positions of employees who took these actions, if known to the complainant, and dates, preferably in chronological order, together with any documentary evidence the complainant may have;

(4) In the case of any allegation of a prohibited personnel practice, the personnel action, as defined in section 1250.3, that has been taken or is proposed to be taken;

(5) In the case of reprisal for disclosure of information by a whistleblower, the information believed to evidence violation of law, rule, or regulation, mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety and when, to whom, and how or in what form it was disclosed;

(6) In the case of reprisal for exercising appeal rights, the action or specific matter that was appealed or grieved, the procedure involved, dates, and name of official or officer appealed to, and decision on or status of the appeal.

(7) A statement as to whether or not the complainant consents to the Special Counsel revealing the complainant's identity to the agency.

(b) If the complainant or whistleblower does not furnish sufficient information, the Special Counsel may request the complainant to do so before acting on the complaint.

#### **§ 1253.3 Withdrawal of complaint.**

A complaint may be withdrawn at any time. However, the Special Counsel may conduct an investigation in the absence of a complaint and withdrawal of a complaint does not necessarily result in termination of the investigation.

#### **§ 1253.4 Request for stay of personnel action.**

(a) A request for a stay of personnel action should be submitted to the Special Counsel as early as possible and should include:

(1) Any available documentary evidence of the personnel action taken or to be taken; and

(2) A chronology of facts evidencing a prohibited personnel practice, as defined in § 1250.3 of this subchapter, has occurred or is to be taken.

(b) If possible, the facts supporting a request for a stay of personnel action should be sworn to or affirmed by the complainant.

#### **§ 1253.5 Disclosure of identity of complainant or whistleblower.**

(a) The identity of any complainant or whistleblower may not be disclosed without his consent, unless the Special Counsel determines that the disclosure of the identity is necessary in order to carry out his functions.

(b) The Special Counsel will determine to disclose the identity of a complainant or whistleblower without express consent only if:

(1) It is clear from the submissions of the complainant or whistleblower that his identity has already been disclosed with respect to the matter complained of (e.g. where the party has filed a grievance, complaint, or appeal on the matter or reported the matter to the agency inspector general or equivalent official without anonymity), or

(2) Immediate action by the Special Counsel is necessary and there is not sufficient time to secure express consent to disclose identity. In such cases, the complainant or whistleblower will be notified of the disclosure immediately.

### **PART 1254—PROSECUTIONS**

#### **Sec.**

1254.1 Complaint.

1254.2 Stay of personnel actions.

1254.3 Enforcement of board decisions.

1254.4 petition for withholding order.

1254.5 Hearings on complaints filed by the Special Counsel.

1254.6 Dismissal by the Special Counsel.

#### **§ 1254.1 Complaint.**

The Special Counsel is authorized to file with the Merit Systems Protection Board, a complaint for disciplinary action against an employee, specifying the law, rule, or regulation violated, together with a statement of supporting facts. The rights of employees against whom complaints are filed are set forth in the Board's regulations (5 CFR 1201.124).

#### **§ 1254.2 Stay of personnel actions.**

(a) The Special Counsel may request any member of the Board to order a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. The stay shall be effective on order of the Board member or on the fourth calendar day (excluding Saturdays, Sundays, and legal holidays) following submission of the petition to the Board member provided the Board member does not deny the stay within three calendar days of submittal.

(b) The Special Counsel may request any member of the Board to extend the

period of any stay for a period of not more than 30 calendar days.

(c) The Special Counsel may request the Board to order a further extension of the stay for such period as the Board considers appropriate.

#### **§ 1254.3 Enforcement of Board decisions.**

(a) If the Special Counsel determines that disciplinary action should be taken against an employee for knowing and willful refusal or failure to comply with an order of the Board, he is authorized to file a complaint setting forth the substance of the violation charged with specificity, including a statement of supporting facts, and to file the complaint with the Board.

(b) The complaint, including the statement of supporting facts, must be served upon the employee at the same time it is filed with the Board.

#### **§ 1254.4 Petition for withholding order.**

When the Special Counsel determines that a State or local agency has failed to remove an employee after a decision requiring such action by the Merit Systems Protection Board under 5 U.S.C. 1505, or that the employee was reemployed within 18 months in a State or local agency of the same State, the Special Counsel may initiate proceedings for a withholding order as provided under 5 U.S.C. 1506, by filing a petition for a withholding order with an administrative law judge designated by the Board.

#### **§ 1254.5 Hearings on complaints filed by the Special Counsel.**

Any employee against whom the Special Counsel presents a complaint to the Merit Systems Protection Board shall, pursuant to the regulations of the Board, have the right to a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer, to be represented by an attorney or other representative, to a hearing before the Board or an administrative law judge designated by the Board, to have a transcript kept of any hearing, to a written decision and reasons therefor, and a copy of any final order on the complaint.

#### **§ 1254.6 Dismissal by the Special Counsel.**

The Special Counsel or his designee may, with leave of the Board or administrative law judge, file a dismissal of all or part of a complaint at any time prior to the close of the hearing before the Board or administrative law judge. Prosecution by the Special Counsel with respect to any of the charges so dismissed shall thereupon terminate.



## **PART 1255—ANCILLARY MATTERS**

### **Subpart A—Discovery**

#### **Sec.**

- 1255.1 Subpenas.
- 1255.2 Testimony and evidence.
- 1255.3 Depositions and interrogatories.
- 1255.4 Witness fees.

### **Subpart B—Prohibition on Disciplinary Action During Pendency of Investigation by Special Counsel**

- 1255.5 Prohibition on Disciplinary Action During Pendency of Investigation by Special Counsel.

### **Subpart C—Advisory Opinions; Intervention; Requests to Merit Systems Protection Board to Review Office of Personnel Management Regulations**

- 1255.6 Advisory Opinions.
- 1255.7 Intervention.
- 1255.8 Requests to Merit Systems Protection Board to Review Office of Personnel Management Regulations.

### **Subpart A—Discovery**

#### **§ 1255.1 Subpenas.**

(a) The Special Counsel may issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States or any territory or possession thereof, the Commonwealth of Puerto Rico, or the District of Columbia. A subpoena may be served by a representative of the Special Counsel, or a U.S. Marshal or Deputy Marshal.

(b) The subpoena must be signed by the Special Counsel, or by his designee upon a specific delegation by the Special Counsel. Subpenas may not be signed in blank.

(c) In the case of contumacy or failure to obey a subpoena issued by the Special Counsel or his designee, the Special Counsel may request the United States District Court for the judicial district in which the person to whom the subpoena is addressed resides, or is served, to issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Upon any failure to obey an order of the court granted pursuant to the application of the Special Counsel, the Special Counsel may request the court to hold the person or persons to whom the order was directed in contempt of court.

(d) Application to a federal court for enforcement of a subpoena issued under this section may be made by the Special Counsel or his designee.

#### **§ 1255.2 Testimony and evidence.**

(a) Pursuant to Civil Service Rule V (5 CFR 5.4) all officers and employees in the executive branch, or applicants or eligibles for positions therein, shall give

to the Special Counsel, or his authorized representative, all information, testimony, and documentary evidence in regard to matters inquired of arising under the laws, rules, and regulations administered by the Special Counsel.

(b) Whenever required by the Special Counsel or his authorized representative, such persons shall subscribe such testimony and make oath or affirmation thereto before an officer authorized by law to administer oaths. Such oath may be administered by any officer or employee of the Office of the Special Counsel authorized to administer such oaths.

#### **§ 1255.3 Depositions and interrogatories.**

The Special Counsel may order the taking of depositions and order responses to written interrogatories. Depositions shall be taken before an officer authorized to administer oaths. Reasonable notice shall be given to the person to be deposed concerning the time, place and subject of the deposition. Answers to interrogatories shall be served upon the Special Counsel or his authorized representative within thirty (30) days of the date of receipt of the interrogatories unless an extension of time has been granted by the Special Counsel or his representative.

#### **§ 1255.4 Witness fees.**

(a) Except as provided in paragraph (c) of this section, witness fees and mileage allowances shall be paid by the party requesting the witness to appear, or asking for and receiving a subpoena requiring the attendance of a witness or the production of documents or other materials, and shall be tendered to the witness or person who is directed to produce documents or other materials along with the subpoena, or, if the witness appears voluntarily, at the time of appearance. When the witness is subpoenaed or appears at the request of the United States or an officer or agency thereof, fees and mileage need not be tendered with the subpoena or prior to the appearance of the witness or production of evidence; payment shall be made by the agency on whose behalf the witness appeared or was subpoenaed, upon the certificate of the Special Counsel or his designee that the witness appeared or produced documents or other evidence.

(b) Witness fees and mileage allowances payable under this section shall be the same as those paid subpoenaed witness in the courts of the United States, as set forth in section 1821 of title 28, United States Code.

(c) Employees of the Federal Government who appear voluntarily or

pursuant to subpoena and who appear in official duty status shall not be entitled to any witness fees or mileage allowance (other than that to which they are entitled under the Federal Travel Regulations). All costs relating to federal employee witnesses shall be paid by the agency against whom the complaint or allegation is filed.

### **Subpart B—Prohibition on Disciplinary Action During Pendency of Investigation by Special Counsel**

#### **§ 1255.5 Prohibition on disciplinary action during pendency of investigation by Special Counsel.**

During any investigation initiated by the Special Counsel, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity, without the express approval of the Special Counsel.

### **Subpart C—Advisory Opinions; Intervention; Requests to Merit Systems Protection Board to Review Office of Personnel Management Regulations**

#### **§ 1255.6 Advisory opinions.**

The Special Counsel is not authorized to issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 of title 5, U.S. Code, dealing with political activity of State and local officers and employees, or subchapter III of chapter 73 of title 5, United States Code, dealing with political activity of Federal officers and employees).

#### **§ 1255.7 Intervention.**

The Special Counsel may intervene or otherwise participate in any proceeding before the Merit Systems Protection Board.

#### **§ 1255.8 Request to the Merit Systems Protection Board to review Office of Personnel Management regulations.**

The Special Counsel may file a written complaint with the Merit Systems Protection Board, requesting the Board to review the validity of any provision of any rule, or regulation issued by the Director of the Office of Personnel Management. Such complaint shall specify the manner in which application of specific provisions of the rule or regulation has resulted or will result in causing any employee or agency to take a prohibited personnel practice.



**PARTS 1256 THROUGH 1259  
[RESERVED]**

**PART 1260—PUBLIC INFORMATION**

**Sec.**

- 1260.1 Public list.
- 1260.2 Freedom of Information Act policy.
- 1260.3 Procedures for obtaining records.
- 1260.4 Service charge for information.
- 1260.5 Appeals.
- 1260.6 Disclosures by authorized officials.

**§ 1260.1 Public list.**

A public list of certain noncriminal whistleblower allegations and Special Counsel findings of violations of law, rule, or regulation, together with reports and certifications by heads of agencies, pursuant to 5 U.S.C. 1206(b)(3) and (c), is available to the public between 8:30 a.m. and 5:00 p.m., weekdays (except legal holidays) in the Office of the Special Counsel, Room 215, 1717 H Street, NW., Washington, D.C. 20419.

**§ 1260.2 Freedom of Information Act policy.**

Upon receipt by the Office of the Special Counsel of a request for agency records under the Freedom of Information Act (5 U.S.C. 552) that are reasonably described, the records shall be provided promptly unless it is determined that one or more of the exemptions under subsection (b) of that Act should be applied to withhold the records. See Appendix I, Disclosure Policy of the Office of the Special Counsel.

**§ 1260.3 Procedures for obtaining records.**

Requests for records may be made in person or in writing and, except in unusual circumstances, a determination shall be made on a request within 10 days (excluding Saturdays, Sundays, and legal holidays). Requests in writing should be addressed to the Office of the Special Counsel, 1717 H Street, NW., Washington, D.C. 20419. Requests in person may be made by appearing at that address during business hours on a regular business day. Requests in writing should be clearly and prominently marked "Freedom of Information Act Request".

**§ 1260.4 Service charge for information.**

(a) Requests for records of the Office of the Special Counsel are subject to the following fees for search and duplication:

Photocopies, per page, \$0.10.

Manual record search, \$5.00 per hour.

Where copies of records have already been made available to an individual in the course of agency proceedings or otherwise, the cost of photocopies to that individual or his representative

shall be fifteen (15) cents per page. Fees for search and duplication of automated records shall be provided upon request.

(b) Requests that do not specify that whatever fees are involved shall be acceptable or acceptable up to a designated amount will be deemed not received for purposes of the time limits for a determination until the requester, after being promptly notified of the anticipated fees, agrees to payment.

(c) When the anticipated fees exceed fifty (\$50.00) dollars, a deposit of twenty (20%) percent of that amount must be made within thirty (30) days after the requester is so advised. Records will not be released until the deposit is received.

**§ 1260.5 Appeals.**

Any denial, in whole or in part, of a request for records of the Office of the Special Counsel may be appealed to the Special Counsel or his designee. The appeal shall be in writing and addressed to the Special Counsel at 1717 H Street, NW., Washington, D.C. 20419. Except in unusual circumstances, the Special Counsel or his designee shall make a determination on the appeal within twenty (20) days (excluding Saturdays, Sundays, and legal holidays) after it is received. When a request is denied on appeal, the requester shall be advised of his right to seek judicial review.

**§ 1260.6 Disclosures by authorized official.**

No employee or former employee of the Office of the Special Counsel shall, in response to a demand of a court or other authority, produce or disclose any information or records acquired as part of the performance of his official duties or because of his official status without the prior approval of the appropriate official of the Office of the Special Counsel. This section does not apply in cases where the Government is a party.

**PART 1261—PRIVACY**

**Sec.**

- 1261.1 Records maintained on individuals.
- 1261.2 Access to records and identification.
- 1261.3 Medical records.
- 1261.4 Requests for amendment of records.
- 1261.5 Appeals.
- 1261.6 Exemptions.

Appendix I—Disclosure Policy of the Office of the Special Counsel.

Authority: 5 U.S.C. 522a.

**§ 1261.1 Records maintained on individuals.**

Information on individuals that are maintained in any group or system of records by the Office of the Special Counsel and which are retrieved by the name of the individual or some identifying particular assigned to the individual, is subject to the Privacy Act

(5 U.S.C. 552a). The terms used in this part that are defined in that section shall have the meanings set forth therein.

**§ 1261.2 Access to records and identification.**

(a) Individuals may request access to records pertaining to them that are maintained as described in section 1261.1 by addressing an inquiry to the Office of the Special Counsel either by mail or by appearing in person at the offices of the Special Counsel at 1717 H Street, NW., Washington, D.C. 20419, during business hours on a regular business day. Requests in writing should be clearly and prominently marked "Privacy Act Request". Requests for copies of records shall be subject to duplication fees set forth in § 1260.4 of this subchapter.

(b) Individuals making a request in person shall be required to present satisfactory proof of identity, preferably a document bearing the individual's photograph. Requests by mail or submitted other than in person should contain sufficient information to enable the Office of the Special Counsel to determine that the requester and the subject of the record are one and the same. To assist in this process, individuals should submit their name and address, date and place of birth, social security number, and any other known identifying information such as an agency file number or identification number and a description of the circumstances under which the records were compiled.

**§ 1261.3 Medical records.**

When a request for access involves medical records that are not otherwise exempt from disclosure, the requesting individual may be advised, if it is deemed necessary, that the records will be provided only to a physician designated in writing by the individual. Upon receipt of the designation, the physician will be permitted to review the records or to receive copies by mail upon proper verification of identity.

**§ 1261.4 Requests for amendment of records.**

Individuals may request amendment of records pertaining to them that are subject to this part. Requests should be addressed, in writing, to the Special Counsel and be clearly and prominently marked "Privacy Act Request". Requests for amendment should include identification of the records together with a statement of the basis for the requested amendment and all available supporting documents and materials. Requests for amendment shall be acknowledged not later than ten (10)



days (excluding Saturdays, Sundays, and legal holidays) after receipt and a determination on the request shall be made promptly.

#### § 1261.5 Appeals.

When a request for access or amendment has been denied, a written appeal may be submitted to the Special Counsel or his designee. A final determination on the appeal shall be issued within thirty (30) days (excluding Saturdays, Sundays, and legal holidays) after receipt. Where unusual circumstances prevent a determination within that time period, the time for a determination may be extended an additional thirty (30) working days after the requesting individual has been advised in writing of the reasons for the extension and the estimated date a determination will be made. Where the final determination denies a request for amendment, the requesting individual shall be notified of his right to file a concise statement of reasons for disagreeing with the final determination. A copy of the statement shall be appended to the disputed record and provided to persons to whom the record is disclosed and to prior known recipients of the record. The Office of the Special Counsel may also attach to the statement a concise account of its reasons for not making the amendments requested. The final determination shall contain a notice of the right to judicial review.

#### § 1261.6 Exemptions.

The Office of the Special Counsel may claim exemptions from the provisions of the Privacy Act at subsections (c)(3) and (d) as permitted by subsection (k) for records subject to the Act that fall within the category of investigatory material described in paragraphs (2) and (5) and testing or examination material described in paragraph (6) of that subsection. The exemptions for investigatory material are necessary to prevent frustration of inquiries into allegations of prohibited personnel practices or political activity and to protect identities of confidential sources of information. The exemption for testing or examination material is necessary to prevent the disclosure of information which would potentially give an individual an unfair competitive advantage or diminish the utility of established examination procedures. The Office of the Special Counsel also reserves the right to assert exemptions for records received from another agency that could be properly claimed by that agency in responding to a request and the Office of the Special Counsel may refuse access to

information compiled in reasonable anticipation of a civil action or proceeding.

#### PARTS 1262 THROUGH 1269 (RESERVED)

##### Appendix I to Part 1261.—Disclosure Policy of the Office of the Special Counsel.

**A. General Statement of Policy.** The purpose of this statement is to express the policies of the Office of the Special Counsel regarding the disclosure of information about cases handled by the office in order to both protect the rights of individuals involved and meet the legitimate informational needs of the public through responsible disclosure.

The Office of the Special Counsel has broad statutory authority to receive and investigate allegations of prohibited personnel practices and certain disclosures of information ("whistleblowing"). To carry out these responsibilities, the identity of persons who provide information and cooperate during an investigation must be protected. Unless the Special Counsel can be assured of a free flow of information from complainants, witnesses, and agencies, the investigative and enforcement functions of the Office of the Special Counsel cannot be discharged in an effective and timely manner. If complainants and witnesses are subjected to reprisal, intimidation, or coercion, they may refuse to come forward with complaints and be hesitant to cooperate.

In the same vein, unless agency management officials feel confident that they will not be subjected to embarrassment and unfair publicity based on unwarranted disclosure of complaints and charges, cooperation from agencies may be limited to only that required by law.

At the same time, complainants and the Congress, as well as interested members of the public and press, should be kept fully informed about activities of the Special Counsel and the disposition of matters brought to his attention. The legislation creating the Office of the Special Counsel contains specific statutory mechanisms for disclosure of information to Congress, complainants, and the public. The legislation also contains restrictions on disclosure of information.

Where there appears to be a conflict between the enabling legislation of the Office of the Special Counsel and other statutes governing disclosure and nondisclosure of information, it shall be the policy of the Special Counsel to favor the former where such an interpretation is necessary to carry out its investigative and enforcement functions absent a well-defined and overriding public interest.

**B. Protecting the Identity of Complainants.** The Special Counsel is precluded from disclosing the identity of a complainant without his consent unless it is determined that disclosure is necessary in order to carry out the Special Counsel's functions. Where circumstances surrounding an investigation create a likelihood that the identity of the complainant may become known, the Special Counsel will weigh the public interest in proceeding with the investigation (based on the seriousness of the charges involved and

the likelihood of obtaining corrective action) against the possibility of harm to the complainant arising from disclosure of his identity. Except where it would jeopardize the likelihood of success in investigation and enforcement, the complainant will be notified when disclosure of the complainant's identity appears imminent.

**C. Protecting the identity of Witnesses.** It shall be the policy of the Special Counsel to protect the identity of witnesses and sources of information who cooperate during an investigation. However, witnesses who provide affidavits or sworn statements will ordinarily be advised that the affidavit or statement is given without a pledge of confidentiality to the extent that it may be used in a proceeding or for official action arising from the investigation. Agency officials and other interested persons shall not, as a matter of right, be given access to statements of witnesses or information from sources collected by the Special Counsel during an investigation.

**D. Protecting the Privacy of Persons Named in an Investigation.** While an investigation is pending, disclosure of the identity of persons who are being investigated shall be limited to disclosures necessary to proceed with the investigation. When an investigation has been terminated, disclosure of information that would reveal the identity of persons associated with the investigation will be based on a determination of how the public interest would be served by disclosure when balanced against the invasion of personal privacy involved. Unless and until an agency official or employee is formally charged with a violation, the focus of the investigation, for disclosure purposes, shall be on prohibited personnel practices or violations of law of the agency concerned. The identity of a person together with the nature of the charges will be revealed when he is made the subject of a written complaint by the Special Counsel or an agency charging violations of law or prohibited personnel practices.

**E. Access to Information by the Complainant.** The Special Counsel will take reasonable steps to ensure that a complainant is advised of the status of an investigation and is given the opportunity to provide information relevant to the investigation. When an investigation is terminated by the Special Counsel, the complainant whose allegation led to the investigation will be advised in writing why the investigation was terminated and the reasons for termination. Where the information provided results in an agency report at the direction of the Special Counsel, the report will be transmitted to the complainant, except when it contains evidence of a criminal violation or when disclosure of the information involved is specifically prohibited by law.

If the information provided by the complainant evidences a violation and the Special Counsel transmits the information to the agency head but does not require an investigation, the Special Counsel will inform the complainant in writing of the matters reported by the agency head.

**F. Access to Information by Employees Subjected to Disciplinary Action.** When the Special Counsel determines that disciplinary



action should be taken against any employee and has prepared and presented a complaint against the employee together with a statement of supporting facts to the employee and the Merit Systems Protection Board, the employee shall be entitled to review the documents and records relied upon to support the disciplinary action.

Access to the identity of a complainant or sources of information consulted during the investigation leading to the disciplinary action will not routinely be made available. Where the circumstances surrounding the proposal for disciplinary action and the information relied upon to support the complaint make it apparent that the employee should be entitled to such information as a matter of due process, access to the identity of the complainant or sources of information will be granted, as necessary, to meet this standard after the complaint against the employee is served on the employee and Merit Systems Protection Board.

**G. Disclosure of Information to Congress.** By statute, when the Special Counsel requires an agency to conduct an investigation and submit a written report within 60 days after a determination that there is a substantial likelihood of prohibited matters within its authority, the report shall be submitted to the Congress, to the President, and to the Special Counsel for transmittal to the complainant.

Agencies that are directed to submit a report under this authority shall transmit the report directly to the President of the Senate and the Speaker of the House of Representatives to satisfy the reporting requirement to Congress.

When any Member of Congress requests access to records or reports prepared by the Office of the Special Counsel or at its direction, and disclosure is not prohibited by law or Executive order, the records or reports requested, depending on the source of the request, shall be transmitted to the oversight committee for the Office of the Special Counsel in the House of Representatives or the oversight committee for the Office of the Special Counsel in the Senate, to be transmitted to the Member.

**H. Disclosure of Information Pertaining to a Pending Investigation.** While an investigation is pending, the Special Counsel will disclose the following information to a member of the public, generally only upon a written request, except where to do so would interfere with enforcement proceedings, constitute an unwarranted invasion of personal privacy or disclose the identity of the complainant:

- (1) Confirmation that an investigation of the matter described by the requester is pending, including the name and location of the agency or agencies involved;
- (2) The nature of the matters under investigation;
- (3) A description of any formal action taken by the Special Counsel.

Generally, any request for access to records or documents pertaining to an investigation will be denied while the investigation is pending.

**I. Public Disclosure of Noncriminal Matters.** In the public interest, the Office of the Special Counsel has statutory authority to

make available to the public a list of noncriminal matters referred to heads of agencies together with the reports and certifications by heads of agencies specified by statute.

The list available to the public shall contain the following information in chronological sequence:

- (1) The nature of the matter;
- (2) The name and location of the agency involved;
- (3) The disposition of the matter, including a description of any corrective action ordered;
- (4) The names and position titles of any agency officials or employees disciplined by adverse action or by action of the Special Counsel, together with the nature of the action arising from the matter.

The information contained in the list together with any related reports or certifications shall be made available within 10 calendar days after final action by the Special Counsel in the matter.

**J. Control of Records.** Records, reports and related materials prepared by or submitted to the Office of the Special Counsel shall be subject to the exclusive control of the Office of the Special Counsel for purposes of disclosure. Any request for access to such records or reports shall be referred to the Special Counsel. When the request for access to reports or records prepared by agencies involves information that may be lawfully protected from disclosure, the Special Counsel will, where practicable, consult with the agency involved. Requests for access to reports or records of an agency in the custody of the Office of the Special Counsel, but not under its control as described above, shall be referred to the agency concerned.

[FR Doc. 79-30919 Filed 12-20-79; 8:45 am]

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2837

Federal Register

Vol. 45, No. 10

Tuesday, January 15, 1980

**OFFICE OF THE SPECIAL COUNSEL,  
MERIT SYSTEMS PROTECTION  
BOARD**

**5 CFR Parts 1250-1269**

**Prohibited Personnel Practices and  
Activities; Procedures for the Receipt  
and Investigation of Allegations**

**AGENCY:** Office of the Special Counsel.

**ACTION:** Final rules; Correction.

**SUMMARY:** This document corrects one  
authority citation and adds authority  
citations for several parts to 5 CFR  
which were revised and published on  
December 21, 1979 (44 FR 75914).

**EFFECTIVE DATE:** December 20, 1979.

**FOR FURTHER INFORMATION CONTACT:**  
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Counsel for Investigation, Office of the  
Special Counsel, 1717 H Street, N.W.,  
Washington, D.C. 20419 (202-653-7140).

**SUPPLEMENTARY INFORMATION:** The  
authority citation for Part 1261 which  
reads "5 U.S.C. 552a" is corrected to  
read "5 U.S.C. 522a". The authority  
citation to Parts 1251-1255 is as follows:  
"Authority: 5 U.S.C. 1206(k); sec. 204(g)  
of Reorganization Plan No. 2 of 1978."  
The authority citation to Part 1260 is as  
follows: "Authority: 5 U.S.C. 1206(k);  
sec. 204(g) of Reorganization Plan No. 2  
of 1978, and 5 U.S.C. 552."

Dated: January 8, 1980.

Mary Eastwood,

*Associate Special Counsel for Investigation.*

[FR Doc. 80-1097 Filed 1-14-80; 8:45 am]

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**OFFICE OF THE SPECIAL COUNSEL,  
MERIT SYSTEMS PROTECTION  
BOARD**

**5 CFR Parts 1250-1269**

**Prohibited Personnel Practices and  
Activities; Procedures for the Receipt  
and Investigation of Allegations**

*Correction*

In FR Doc. 80-1097, appearing on page  
2837, second column, the third and  
fourth lines of the "Supplementary  
Information:" paragraph should have  
read: "reads '5 U.S.C. 522a' is corrected  
to '5 U.S.C. 552a.'" The authority".

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